

UNITED STATES DISTRICT COURT  
DISTRICT OF OREGON  
PORTLAND DIVISION

JENNIFER ROWLAND,

No. 3:12-cv-00549-HU

Plaintiff,

**FINDINGS AND  
RECOMMENDATION**

v.

CAROLYN W. COLVIN, Acting  
Commissioner of Social Security,  
Defendant.

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1 HUBEL, Magistrate Judge:

2 Jennifer Rowland ("Rowland") seeks judicial review of a final  
3 decision of the Commissioner of Social Security ("Commissioner")  
4 denying her applications for disability insurance benefits ("DIB")  
5 and supplemental security income benefits ("SSI") under Titles II  
6 and XVI of the Social Security Act. This court has jurisdiction to  
7 review the Commissioner's decision pursuant to 42 U.S.C. § 405(g).  
8 For the reasons set forth below, the Commissioner's decision should  
9 be AFFIRMED.

#### 10 **I. PROCEDURAL BACKGROUND**

11 On October 28, 2008 and May 10, 2010, respectively, Rowland  
12 filed a Title II application for DIB and a Title XVI application  
13 for SSI, alleging disability beginning September 2, 2006. Those  
14 claims were denied and, upon Rowland's request, a hearing was held  
15 before an Administrative Law Judge ("ALJ") on August 24, 2010, at  
16 which Rowland and a vocational expert ("VE") testified. The ALJ  
17 issued a decision denying Rowland's claim for benefits on September  
18 10, 2010. Rowland then requested review of the ALJ's decision,  
19 which was subsequently denied by the Appeals Council on January 27,  
20 2012. As a result, the ALJ's decision became the final decision of  
21 the Commissioner that is subject to judicial review. This appeal  
22 followed on March 26, 2012.

#### 23 **II. FACTUAL BACKGROUND**

24 On August 17, 2007, Rowland was seen by Edward Goldberger  
25 ("Goldberger"), M.D., of Arthritis Associates of Northwest Ohio.  
26 Rowland reported experiencing "chronic pain in the low back which  
27 radiates down both lower extremities" and "bilateral upper  
28 extremity pain particularly in the upper arms." (Tr. 270.) Rowland

1 stated that "she had no significant musculoskeletal problems until  
2 August 2006 when she was involved in a motor vehicle accident."  
3 (Tr. 270.) Goldberger noted that "[r]ecent laboratory workup ha[d]  
4 demonstrated a slightly elevated [erythrocyte sedimentation rate],"  
5 but her "rheumatoid factor, [antinuclear antibody], and [human  
6 leukocyte antigen tests] were all negative or normal." (Tr. 270.)  
7 A lumbar magnetic resonance imaging ("MRI") scan from November 2006  
8 was normal, as were cervical and thoracic x-rays from June 2007.

9 Goldberger tested Rowland for tender points characteristic of  
10 fibromyalgia. Finding those present, he diagnosed her with  
11 fibromyalgia and provided an education sheet on that condition. It  
12 appears that Rowland qualified as having the required eleven or  
13 more out of eighteen tender points.<sup>1</sup> Goldberger's findings refer  
14 to bilateral tender points being present on Rowland's lower  
15 cervical spine, trapezius, supraspinatus, "upper costo-sternal  
16 junction," "proximal forearm," glutes, and "medial fat pad." (Tr.  
17 273.) However, Goldberger did "not believe there [wa]s any  
18 complicating neurologic problem or inflammatory disease." (Tr.  
19 273.) In addition to receiving an education sheet on fibromyalgia,  
20 Rowland was "counseled regarding regular sustained exercise for at  
21 least 30 minutes, 3-4 times per week." (Tr. 273.)

22 On May 18, 2007, Rowland visited Pamela Hackl ("Hackl"), M.D.,  
23 complaining of continued pain in her upper and lower extremities.  
24 Rowland reported that her pain was aggravated by "walking or  
25

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26  
27 <sup>1</sup> See *Bales v. Colvin*, No. CV 12-08061-JEM, 2013 WL 3449194,  
28 at \*5 (C.D. Cal. July 9, 2013) ("[T]he accepted diagnostic test for  
fibromyalgia is that [the] [p]laintiff must have pain in 11 of 18  
tender points.")

1 sitting for prolonged periods" and that she "c[ould]n't tolerate  
2 sitting in [a] chair." (Tr. 237.) Rowland was instructed to take  
3 one 30-milligram Cymbalta pill a day to treat her chronic pain.

4 On May 25, 2007, Rowland had a follow-up visit with Hackl and  
5 reported no improvement in her pain while taking Cymbalta. Rowland  
6 also said she experienced "episodes of weakness" when talking on  
7 the phone or brushing her hair. Hackl increased Rowland's dosage  
8 of Cymbalta to sixty milligrams per day and prescribed 100  
9 milligrams of Tramadol per day.

10 Rowland returned to Hackl's clinic on June 1, 2007. Rowland  
11 stated that "she [wa]s unable to work, unable to go to school,  
12 unable to even go to the movies because she c[ould]n't sit for  
13 prolonged periods." (Tr. 235.) Because Rowland reported problems  
14 with insomnia after her Cymbalta dose was increased, Hackl told  
15 Rowland to stop taking the medication. Hackl also increased  
16 Rowland's dosage of Tramadol to 200 milligrams per day.

17 Rowland's pain persisted and on July 2, 2007, Hackl discussed  
18 the possibility of fibromyalgia based on "pain . . . [at] all  
19 trigger points except those on [Rowland's] anterior chest." (Tr.  
20 233.)

21 During an examination on July 30, 2007, Rowland told Hackle  
22 that she "ha[d] been doing extensive research on fibromyalgia."  
23 (Tr. 231.)

24 On April 23, 2008, Rowland visited Hackl complaining of  
25 "throbbing and sharp" pain in her knees. (Tr. 230.) She also  
26 reported experiencing mid-back pain and "some numbness in [her]  
27 toes." (Tr. 230.) Hackl's treatment notes references diagnoses of  
28 fibromyalgia and patella femoral pain syndrome.

1 On May 1, 2008, Rowland was referred to Probability Physical  
2 Therapy by Hackl for treatment of left knee pain. After completing  
3 twelve physical therapy sessions, Rowland reported "50% improvement  
4 in [her] symptoms with increased walking tolerance and standing  
5 tolerance." (Tr. 276.)

6 Rowland had a follow-up visit with Hackl on July 16, 2008.  
7 Rowland stated that her "leg pain [was] 3-4/10 tops." (Tr. 227.)

8 The following month, Rowland told Hackl that she recently  
9 began working at Panera Bread, but couldn't handle more than two  
10 consecutive six-hour shifts without experiencing "fibromyalgia  
11 flair ups." (Tr. 225.) As a result, Rowland asked Hackl to  
12 provide her with a doctor's note.

13 On October 2, 2008, Rowland met with Hackl to discuss her  
14 fibromyalgia treatment. Rowland said that Cymbalta and Lyrica had  
15 little or no benefit, but she found Tramadol "very helpful" in  
16 treating her pain. (Tr. 223.)

17 In early November 2008, Rowland underwent a neurology  
18 consultation with Robert Grimm ("Grimm"), M.D., in Portland,  
19 Oregon. Grimm noted that

20 Rowland c[ould] stand in a routine Rhomberg position with  
21 her eyes open or closed and not lose balance. In a heel-  
22 toes stance as well as when tandem walking, if she closes  
23 her eyes. She loses her balance in such efforts. She  
24 can stand on her heels and toes and mount a short hop on  
25 either foot. There is no general case for limb weakness.

26 (Tr. 278-79.) Overall, Rowland's "exam "reveal[ed] a number of  
27 subtle abnormalities of undefined origin of central and peripheral  
28 def[icits]—none of which have any obvious bearing on her chronic  
pain/ fibromyalgia syndrome." (Tr. 279.) Grimm's diagnostic  
impressions included, among other things: (1) a "[m]ildly abnormal

1 neurological examination," (2) "[m]oderate obesity," and (3)  
2 "[d]iffuse, chronic pain syndrome; prior diagnoses of  
3 fibromyalgia." (Tr. 277.)

4 On November 24, 2008, Rowland completed an adult function  
5 report. Rowland described a typical day as consisting of waking up  
6 and eating, showering, surfing the Internet on multiple occasions,  
7 "attempting" to do homework, running errands when necessary, making  
8 dinner, and watching television. Rowland indicated that her  
9 fibromyalgia-related pain impacts her ability to sleep, work,  
10 exercise, perform daily chores, stand, sit, and drive. Rowland  
11 does not, however, have any difficulty in terms of personal care.  
12 Rowland estimated that she can walk between thirty and sixty  
13 minutes before needing to stop and rest, and her ability to sit  
14 depends on the level of pain she is experiencing.

15 On February 5, 2009, Rowland had a twenty-five minute follow-  
16 up visit with Grimm. (Tr. 281.) Rowland reported that she was  
17 sleeping twelve to fourteen hours per day and was "in too much pain  
18 to do anything." (Tr. 281.) However, Grimm also observed that  
19 Rowland was "smiling, looking well and reporting 'I am getting a  
20 lot of work [done].'" (Tr. 281.)

21 On February 11, 2009, Daivati Bharadvaj ("Bharadvaj"), a  
22 naturopathic physician at Alive & Well Healing Arts, sent a letter  
23 to the Oregon Depart of Human Services, which stated:

24 Rowland . . . has been my patient since Oct[ober] 24,  
25 2008 for addressing her pain from fibromyalgia. . . . All  
26 imaging studies and laboratory evaluation[s] done . . .  
27 [have been] unremarkable . . . . She has tried, to no  
28 avail, the typical treatment protocols for fibromyalgia  
including Lyrica, Cymbalta, Tramadol, exercise and  
physical therapy, acupuncture, etc.

. . . .

1 . . . She started using Oxycontin for her  
 2 debilitating pain, but it just 'takes the edge off.'  
 3 After starting Oxycontin, she report[ed] increased  
 4 tolerance, and the need for higher doses to help ease the  
 5 pain. Her pain levels in her legs and back have been  
 6 reported as [nine] or [ten] on a 1-10 pain scale ([ten  
 7 being the] worst) . . . .

8 . . . .

9 From my perspective, as her naturopathic physician,  
 10 I observe her as being debilitated when she arrives for  
 11 her visits. . . . Her previous employment required her to  
 12 remain standing for hours at a time, which she is  
 13 currently not able to do at all. . . . I believe that she  
 14 will need some time off from work all together to focus  
 15 on regaining her health and well-being, as she is in no  
 16 shape to take on most mentally and physically demanding  
 17 assignments until her pain levels are better managed.

18 (Tr. 283.)<sup>2</sup>

19 On February 14, 2009, Rowland was referred to family nurse  
 20 practitioner Molly Aultz ("Aultz") by Bharadvaj. After examining  
 21 Rowland, Aultz concluded that she "[d]oes not meet the diagnostic  
 22 criteria for fibromyalgia" and had "none of the common  
 23 comorbidities," i.e., a concomitant but unrelated pathological or  
 24 disease process. (Tr. 299.) In particular, Aultz stated that,  
 25 "unlike the majority of fibromyalgia patients," Rowland "tends  
 26 toward hypersomnolence," i.e., sleeping an excessive amount. (Tr.  
 27 298.) It is interesting to note that Rowland: (1) told Aultz a  
 28 current stressor was a cousin who was "angry at [her] for not  
 working," and (2) denied currently using illicit drugs or

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<sup>2</sup> Bharadvaj attached to his letter the treatment notes from Rowland's visits to Alive & Well Healing Arts. Because Bharadvaj's letter adequately summarizes his impression of Rowland, those treatment notes will not be discussed individually in this background section.

1 "marijuana in the past" even though she apparently "[k]eeps  
2 marijuana on hand." (Tr. 298.)

3 On April 28, 2009, Atulya Deodhar ("Deodhar"), M.D., a doctor  
4 who specializes in rheumatology at Oregon Health & Science  
5 University ("OHSU"). According Deodhar, Rowland "has [been  
6 diagnosed with fibromyalgia] but her [primary care physician] is  
7 worried that some of her pains may not fit with [fibromyalgia]."  
8 (Tr. 328.) After conducting a thorough examination of Rowland,  
9 Deodhar's impression was as follows:

10 This is a [23-year-old] female here for follow up of  
11 [fibromyalgia]. She does not have any evidence of  
12 autoimmune inflammatory disease. She does not have  
13 rheumatoid arthritis and further blood or radiographic  
14 testing would be not very useful. She has Central  
15 Sensitization as the cause of her generalized pain  
16 syndrome. She also has morbid obesity at such a young  
17 age which is her major health problem. Her anterior  
18 thigh pains are suggestive of meralgia paraesthetica –  
19 compression of the lateral cutaneous nerve of the thigh  
20 underneath the inguinal ligament. This is obesity  
21 related too.

22 (Tr. 330.)

23 Deodhar recommended that: (1) Rowland's primary care physician  
24 prescribe Zanaflex to be taken at bedtime for muscle relaxation  
25 since she "complain[ed] bitterly about muscle spasms"; (2) Rowland  
26 be referred to a metabolic clinic "made for morbid obesity"; and  
27 (3) Rowland's primary care physician prescribe "short acting  
28 hypnotic drugs such as [A]mbien, [S]onata or [R]ozarem for her poor  
29 sleep." (Tr. 330.) He also indicated that Rowland was being sent  
30 back "for trigger point injections." (Tr. 330.)

31 On January 6, 2010, Colin Hoobler ("Hoobler"), a physical  
32 therapist, sent Bharadvaj a letter stating: "Ms. Rowland ha[s]  
33 progressed wonderfully throughout her course of [physical therapy]

1 following [eleven] sessions drastically reducing her pain even with  
2 moderate intensity exercise. However, insurance limitations have  
3 precluded her from returning and thus we are discharging her from  
4 [physical therapy]." (Tr. 342.)

5 On August 24, 2010, Rowland appeared and testified at a  
6 hearing before the ALJ. At the time of the hearing, Rowland  
7 testified that she was twenty years old, five feet four inches tall  
8 and weighed about 235 pounds. Rowland graduated from high school  
9 and, at one point, was pursuing a bachelor's degree in psychology  
10 through online courses.<sup>3</sup> She was enrolled at Bowling Green  
11 University in the fall of 2007, but quit after one semester because  
12 attending classes ten to twelve hours a week was too physically  
13 demanding.

14 Rowland has never held a full-time job and last worked on a  
15 part-time basis (e.g., between eight to fifteen hours a week) in  
16 October 2008 at Panera Bread, where she prepared coffee and  
17 breakfast sandwiches and bused tables. Rowland stopped working at  
18 Panera Bread because she was required to stand on her feet for  
19 significant periods of time and "[i]t became too painful."<sup>4</sup> (Tr.  
20 42.) However, Rowland testified that her most significant barrier  
21 to employment is her inability to sit longer than thirty to forty  
22 minutes without experiencing back pain and/or spasms.

23 About four years prior to the hearing, Rowland testified that  
24 she was involved in a motor vehicle accident and began to  
25

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26 <sup>3</sup> During the hearing before the ALJ, Rowland testified that  
27 she "currently [was] not in school." (Tr. 55.)

28 <sup>4</sup> Rowland also mentioned that Panera Bread declined to  
accommodate her request to work every other day.

1 experience pain in her lower back, spine, neck and shoulder. Over  
2 the years, the pain has intensified and "spread out to other parts  
3 of [Rowland's] body," including her shoulder blades, legs, arms,  
4 and elbows. (Tr. 45.) She also experiences "lots of headaches."  
5 (Tr. 45.) Rowland describes the pain as "a burning, stabbing,  
6 aching" sensation "all over [her] body." (Tr. 45.)

7 According to Rowland, her doctors have performed "all the  
8 tests in the book and . . . tell [her] that there's nothing wrong  
9 with [her]" other than fibromyalgia and a Temporomandibular Joint  
10 Disorder ("TMJ"), which causes her headaches.<sup>5</sup> (Tr. 47.) In order  
11 to manage her TMJ and fibromyalgia-related pain, Rowland consumes  
12 one 15-milligram Oxycodone pill per day, three 30-milligram  
13 Oxycodone pills per day, three 100-milligram Neurontin pills per  
14 day, an unspecified dose of Savella twice a day, and an unspecified  
15 dose of Tramadol twice a day.<sup>6</sup>

16 Also on August 24, 2010, the ALJ received testimony from VE  
17 Patricia Ayerza ("Ayerza"). The ALJ asked the VE to consider a  
18 person of Rowland's age, education and experience, who is limited  
19 to sedentary work. The VE testified that an individual with these  
20 limitations could perform the jobs of cashier II (e.g., booth  
21 cashier and ticket seller) and electronics worker. The ALJ then  
22 added the following limitations to the previous hypothetical: (1)

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24 <sup>5</sup> The Court was unable to locate a diagnosis of TMJ in the  
25 record.

26 <sup>6</sup> The ALJ commented on the fact that Rowland was consuming a  
27 significant amount of narcotic medications on a daily basis. (Tr.  
28 49) ("I would characterize your . . . narcotic medication usage as  
significant.") Indeed, the transcript contains numerous  
prescription refills for these medications.

1 the claimant would need a sit/stand option; and (2) the claimant  
2 would need to be limited to simple tasks "consistent with unskilled  
3 work." (Tr. 59.) The VE testified that, "[a]t that level, [she]  
4 could offer the same two jobs because they will allow for a  
5 sit/stand option and they are simple, repetitive work." (Tr. 59.)  
6 Such a hypothetical individual could not sustain competitive  
7 employment, however, if they "would need to take unscheduled breaks  
8 during the day to lie down," which would "consistently exceed" the  
9 time normally allotted for breaks in the workplace. (Tr. 59-60.)

### 10 **III. THE FIVE-STEP SEQUENTIAL EVALUATION PROCESS**

#### 11 **A. Legal Standard**

12 A claimant is considered disabled if he or she is unable to  
13 "engage in any substantial gainful activity by reason of any  
14 medically determinable physical or mental impairment which . . .  
15 has lasted or can be expected to last for a continuous period of  
16 not less than 12 months[.]" 42 U.S.C. § 423(d)(1)(A). "Social  
17 Security Regulations set out a five-step sequential process for  
18 determining whether an applicant is disabled within the meaning of  
19 the Social Security Act." *Keyser*, 648 F.3d at 724. Those five  
20 steps are as follows:

- 21 (1) Is the claimant presently working in a substantially  
22 gainful activity? (2) Is the claimant's impairment  
23 severe? (3) Does the impairment meet or equal [one of  
24 the listed impairments]? (4) Is the claimant able to  
perform any work that he or she has done in the past? and  
(5) Are there significant numbers of jobs in the national  
economy that the claimant can perform?

25 *Keyser*, 648 F.3d at 724-25. The claimant bears the burden of proof  
26 for the first four steps in the process. If the claimant fails to  
27 meet the burden at any of those four steps, then the claimant is  
28

1 not disabled. *Bustamante v Massanari*, 262 F.3d 949, 953-54 (9th  
2 Cir. 2001); *Bowen v. Yuckert*, 482 U.S. 137, 140-41 (1987).

3 The Commissioner bears the burden of proof at step five of the  
4 process, where the Commissioner must show the claimant can perform  
5 other work that exists in significant numbers in the national  
6 economy, "taking into consideration the claimant's residual  
7 functional capacity, age, education, and work experience." *Tackett*  
8 *v. Apfel*, 180 F.3d 1094, 1100 (9th Cir. 1999). If the Commissioner  
9 fails meet this burden, then the claimant is disabled, but if the  
10 Commissioner proves the claimant is able to perform other work  
11 which exists in the national economy, then the claimant is not  
12 disabled. *Bustamante*, 262 F.3d at 954 (citations omitted).

### 13 **B. The ALJ's Decision**

14 At the first step of the five-step sequential evaluation  
15 process, the ALJ found that Rowland had not engaged in substantial  
16 gainful activity since September 2, 2006, the alleged disability  
17 onset date. At the second step, the ALJ found that Rowland had the  
18 following severe impairments: fibromyalgia, pain syndrome, and  
19 obesity. At the third step, the ALJ found that Rowland's  
20 combination of impairments were not the equivalent of any of the  
21 impairments enumerated in 20 C.F.R. § 404, subpt P, app. 1. The  
22 ALJ therefore assessed Rowland as having the residual functional  
23 capacity ("RFC") to perform sedentary work, subject to the  
24 following limitations: (1) Rowland needs a sit/stand option; and  
25 (2) she must be "limited to simple work consistent with unskilled  
26 work." (Tr. 19.)

27 At the fourth step, the ALJ found that Rowland has no past  
28 relevant work. At the fifth step, the ALJ found in light of

Rowland's age (*i.e.*, twenty years old at the time of alleged disability onset), education, work experience, and RFC that there were jobs existing in significant numbers in the national and local economy that she could perform, including a cashier II and electronics worker. Based on the finding that Rowland could perform jobs existing in significant numbers in the national economy, the ALJ concluded that she was not disabled as defined in the Act from September 2, 2006 (the alleged disability onset date), through September 10, 2010 (the date of the ALJ's decision).

#### IV. STANDARD OF REVIEW

The court may set aside a denial of benefits only if the Commissioner's findings are "'not supported by substantial evidence or [are] based on legal error.'" *Bray v. Comm'r Soc. Sec. Admin.*, 554 F.3d 1219, 1222 (9th Cir. 2009) (quoting *Robbins v. Soc. Sec. Admin.*, 466 F.3d 880, 882 (9th Cir. 2006)). Substantial evidence is "'more than a mere scintilla but less than a preponderance; it is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Bray*, 554 F.3d at 1222 (quoting *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995)).

The court "cannot affirm the Commissioner's decision 'simply by isolating a specific quantum of supporting evidence.'" *Holohan v. Massanari*, 246 F.3d 1195, 1201 (9th Cir. 2001) (quoting *Tackett*, 180 F.3d at 1097). Instead, the court must consider the entire record, weighing both the evidence that supports the Commissioner's conclusions, and the evidence that detracts from those conclusions. *Holohan*, 246 F.3d at 1097. However, if the evidence as a whole can support more than one rational interpretation, the ALJ's decision must be upheld; the court may not substitute its judgment for the

ALJ's. *Bray*, 554 F.3d at 1222 (citing *Massachi v. Astrue*, 486 F.3d 1149, 1152 (9th Cir. 2007)).

## V. DISCUSSION

### A. Rowland's Credibility

Rowland first argues that the ALJ failed to provide clear and convincing reasons for rejecting her testimony about the extent of her limitations. In *Morgan v. Commissioner of Social Security Administration*, 169 F.3d 595 (9th Cir. 1999), the Ninth Circuit explained what is required of an ALJ in order to discredit a claimant's symptom testimony:

Without affirmative evidence showing that the claimant is malingering, the Commissioner's reasons for rejecting the claimant's testimony must be clear and convincing. If an ALJ finds that a claimant's testimony relating to the intensity of his pain and other limitations is unreliable, the ALJ must make a credibility determination citing the reasons why the testimony is unpersuasive. The ALJ must specifically identify what testimony is credible and what testimony undermines the claimant's complaints. In this regard, questions of credibility and resolutions of conflicts in the testimony are functions solely of the Secretary.

*Id.* at 599 (citations omitted).

Ninth Circuit case law demonstrates that clear and convincing reasons "include conflicting medical evidence, effective medical treatment, medical noncompliance, inconsistencies in the claimant's testimony or between her testimony and her conduct, daily activities inconsistent with the alleged symptoms, and testimony from physicians and third parties about the nature, severity and effect of the symptoms complained of." *Bowers v. Astrue*, No. 6:11-cv-583-SI, 2012 WL 2401642, at \*9 (D. Or. June 25, 2012).

In assessing a claimant's credibility, an ALJ may also consider "(1) ordinary techniques of credibility evaluation, such

1 as the claimant's reputation for lying, prior inconsistent  
2 statements concerning the symptoms, and other testimony by the  
3 claimant that appears less than candid; (2) unexplained or  
4 inadequately explained failure to seek treatment or to follow a  
5 prescribed course of treatment; and (3) the claimant's daily  
6 activities." *Smolen v. Chater*, 80 F.3d 1273, 1284 (9th Cir. 1996).  
7 If the ALJ's credibility finding is supported by substantial  
8 evidence in the record, district courts may not engage in  
9 second-guessing. *Thomas v. Barnhart*, 278 F.3d 947, 959 (9th Cir.  
10 2002); *Bray*, 554 F.3d at 1222 (defining substantial evidence as  
11 relevant evidence that a reasonable mind might accept as adequate  
12 to support a conclusion).

13 Here, the ALJ provided clear and convincing reasons for  
14 rejecting Rowland's symptom testimony, and those reasons were  
15 supported by substantial evidence. In her written decision, the  
16 ALJ found Rowland "credible to the extent she suffers from some  
17 impairments." (Tr. 20.) However, the ALJ rejected Rowland's  
18 "allegation that she is incapable of all work activity" because the  
19 evidence in the record reflected that Rowland's "functional  
20 limitations [were] not as significant and limiting as ha[d] been  
21 alleged." (Tr. 20.)

22 In support of this determination, the ALJ first discussed  
23 conflicting medical evidence and testimony from medical sources  
24 about the nature, severity and effect of the symptoms complained  
25 of. For example, although Rowland testified that her most  
26 significant barrier to employment is her inability to sit longer  
27 than thirty to forty minutes without experiencing back pain and/or  
28

1 spasms, a lumbar MRI scan from November 2006 was normal, as were  
2 cervical and thoracic x-rays from June 2007.

3 In addition, Deohdar stated that Rowland's primary care  
4 physician was concerned that some of her symptoms were inconsistent  
5 with a diagnosis of fibromyalgia. The primary care physician's  
6 concerns were confirmed by Aultz's examination, which revealed that  
7 Rowland "[d]oes not meet the diagnostic criteria for fibromyalgia"  
8 and had "none of the common comorbidities," *i.e.*, a concomitant but  
9 unrelated pathological or disease process. (Tr. 299.) Importantly,  
10 Aultz stated that, "unlike the majority of fibromyalgia patients,"  
11 Rowland "tends toward hypersomnolence," *i.e.*, sleeping an excessive  
12 amount. (Tr. 298.) In her written decision, the ALJ gave Rowland  
13 "the benefit of the doubt" and found fibromyalgia to be a severe  
14 impairment based, in large part, on Goldberger's August 2007  
15 diagnosis. It is inescapable, however, that Deohdar's statements,  
16 coupled with Aultz's findings, support the ALJ's ultimate  
17 conclusion that "the medical record as a whole . . . do[es] not  
18 support the severity of [Rowland's] allegations." (Tr. 21.)

19 Indeed, in Deodhar's view, Rowland does not have rheumatoid  
20 arthritis and her generalized pain syndrome is caused by central  
21 sensitization (*i.e.*, pain hypersensitivity). But "her major health  
22 problem" is morbid obesity which contributes to her leg pains. (Tr.  
23 330.) The record is replete with examples where medical care  
24 providers recommended that Rowland exercise more often. As the ALJ  
25 noted in her decision, when Rowland actually complied with these  
26 recommendations, she responded quite favorably: "Ms. Rowland . . .  
27 drastically reduc[ed] her pain even with moderate intensity  
28 exercise." (Tr. 342.)

1        Moreover, Rowland reported experiencing "episodes of  
2 weakness"—which would move around from her neck, shoulders, arms,  
3 back, and legs, (Tr. 236)—while talking on the phone, brushing her  
4 hair or lifting a magazine. (Tr. 234, 236.) Apparently, these  
5 episodes made Rowland feel, for example, "like she ha[d] to put the  
6 phone down or the brush down." (Tr. 236.) That testimony is in  
7 direct conflict with Grimm's November 2008 neurological  
8 examination: "There is no general case for limb weakness." (Tr.  
9 279.) Rowland reported experiencing difficulty with basic self-  
10 care activities such as brushing her teeth and taking showers. (Tr.  
11 50.) That testimony is in direct conflict with Rowland's adult  
12 function report, which indicates that she has no problem with  
13 personal care. (Tr. 173.)

14        Rowland's activities were also inconsistent with her hearing  
15 testimony. During the August 24, 2010 hearing before the ALJ,  
16 Rowland described her typical day as follows:

17        A.    A typical day for me, of course, this is depending  
18        on how I sleep, but usually I don't sleep through the  
19        night and most days I'm not getting that deep REM so I  
20        won't wake up until 12:00/1:00 o'clock [in the afternoon]  
21        and for most of the day, I'm in bed. I get up and I'll  
22        eat something and I'm just laying in bed most of the day  
23        because -- either because I'm tired because I haven't had  
24        that good sleep or because I'm in so much pain that I  
25        can't physically exert myself to do anything else or it  
26        could also be from the side effects from my  
27        medication . . . oxycodone makes me very sleepy so if  
28        I've taken a pill, it could - it can totally just knock  
29        me out. So I'm sleeping on and off throughout the day.

30        Q.    Do you do some chores when you're not sleeping?

31        A.    I attempt doing the dishes. Vacuuming is - can be  
32        very difficult to do - standing up like that and moving  
33        my body like that. I can't just get up and brush my  
34        teeth for instance. It takes me a while to actually once  
35        I get up to actually anything like that. Showers are  
36        very difficult.

1 (Tr. 50.)

2 Two days later, on August 26, 2010, Rowland told Vladimir Fiks  
3 ("Fiks"), M.D., that she would be leaving Oregon for a seven-week  
4 trip to Pittsburgh, Pennsylvania in early September. (Tr. 422.)  
5 This report is very difficult to reconcile with the virtually bed-  
6 ridden individual described to the ALJ. Interestingly, Rowland  
7 presented the same story to Fiks in October 2010, when she  
8 requested seven weeks worth of opiate medications in advance of a  
9 trip to Pennsylvania. (Tr. 435.) Fiks said he would not "give her  
10 [seven] weeks of [opiate] medications," nor was he willing to  
11 prescribe Rowland Benzodiazepine: "The patient requests medications  
12 for anxiety [and] no sleep but I have informed her I will not  
13 prescribe antidepressants or Benzodiazepine to a patient who is  
14 leaving for [seven] weeks, plus benzodiazepines are not a  
15 medication I am willing to prescribe at all." (Tr. 435.) Fiks  
16 also noted that he needed to discuss Rowland's last urine drug  
17 screening ("UDS") because it tested positive for Hydromorphone.  
18 (Tr. 435.)

19 Lastly, the record could have arguably supported a finding  
20 that Rowland's work history and/or lack of a propensity to work  
21 negatively affected her credibility regarding her inability to do  
22 so. In *Thomas*, the Ninth Circuit held that the ALJ gave specific,  
23 clear and convincing reasons for discounting the claimant's  
24 testimony. *Thomas*, 278 F.3d at 959. Notably, the Ninth Circuit  
25 emphasized that, in addition to finding no objective medical  
26 evidence to support the claimant's description of pain and  
27 limitations, the ALJ found that the claimant had an "extremely poor  
28 work history" and "ha[d] shown little propensity to work in her

lifetime," which negatively affected her credibility regarding her inability to work. *Id.*

In sum, the ALJ's credibility finding was clearly supported by substantial evidence in the record. The Court will not engage in second-guessing.

#### **B. Sit/Stand Option**

Next, Rowland argues that the ALJ erred as a matter of law because she did not specify the frequency of the sit/stand option.<sup>7</sup> See Social Security Ruling ("SSR") 83-12, 1983 WL 31253, at \*4 (1983) ("Unskilled types of jobs are particularly structured so that a person cannot ordinarily sit or stand at will. In cases of unusual limitation of ability to sit or stand, a [vocational expert] should be consulted to clarify the implications for the occupational base."); SSR 96-9p, 1996 WL 374185, at \*7 (July 2, 1996) ("The RFC assessment must be specific as to the frequency of the individual's need to alternate sitting and standing. It may be especially useful in these situations to consult a vocational resource in order to determine whether the individual is able to make an adjustment to other work.")<sup>8</sup>

In *Swofford v. Commissioner Social Security Administration*, No. 3:12-cv-00557-MA, 2013 WL 3333063 (D. Or. July 1, 2013), as here, the claimant argued that "the ALJ was required to specify for how much time [the claimant] could sit or stand in the 'sit/stand

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<sup>7</sup> (Pl.'s Opening Br. at 9) ("[The ALJ] did not specify alternation frequency and erred thereby as a matter of law.")

<sup>8</sup> With respect to Rowland's ability to sit or stand, the ALJ consulted a vocational expert to clarify the implications for the occupational base, consistent with SSR 83-12 and SSR 96-9p.

option.'" *Id.* at \*6. In affirming the Commissioner's denial of benefits, Judge Marsh concluded that such an argument was "without merit," stating: "[C]ommon sense dictates that a 'sit/stand option' means exactly what it says; [the claimant] must have the option to either sit or stand at work. This is consistent with a requirement that [the claimant] have the ability to 'sit or stand at will.'" *Id.*

Similarly, in *Buckner-Larkin v. Astrue*, 450 F. App'x 626 (9th Cir. 2011), the claimant argued that her RFC was incorrectly determined because the ALJ did not set forth a function-by-function assessment. *Id.* at 627. The Ninth Circuit rejected this argument, noting in particular that the claimant's RFC "included a sit-stand option, which [wa]s most reasonably interpreted as sitting or standing 'at-will,' based on the record." *Id.*

As in *Swofford*, the Court concludes that the ALJ's RFC assessment was sufficiently specific as to the frequency of Rowland's need to alternate sitting and standing. In fact, the ALJ's RFC assessment may have been overly generous to Rowland. The vast majority of the evidence in the record concerning Rowland's need to for a sit/stand option was predicated on her own subjective complaints which were properly discounted. When you consider the fact that Rowland had the ability and desire to go on a seven-week trip to the other side of the country, it seems to be a logical inference that her need to alternate sitting and standing could "be accommodated by scheduled breaks and a lunch period." SSR 96-9p, 1996 WL 374185, at \*7. In any event, the record suggests, at the very best for Rowland, that her RFC included an at-will sit/stand

option, as in *Buckner-Larkin*. There was no error here, much less harmful error.

**C. Divergence from the Dictionary of Occupational Titles**

Finally, Rowland argues that the ALJ erred by relying on VE testimony that “diverged widely” from the Dictionary of Occupational Titles (“DOT”). (Pl.’s Opening Br. at 10.) As Rowland explains,

[t]he ALJ’s sedentary capacity finding precludes the performance of each and every [l]ight level job described by the [DOT]. . . . [Yet,] the VE named only [l]ight jobs in response to the sedentary, unspecified-frequency-sit-stand hypothetical. Hence, the VE diverged from the DOT in two ways: (1) [s]he identified only [l]ight jobs in response to [s]edentary restrictions; and (2) [n]one of the jobs she identified describe a sit/stand option with unspecified sitting and standing frequency.

(Pl.’s Opening Br. at 10.)

This second argument was raised and rejected by Judge Marsh in *Swofford*: “[The claimant] also argues that the ‘sit/stand option’ deviated from the DOT. *The DOT, however, does not include such postural requirements. The ALJ was entitled to rely on the VE’s expertise in this respect.*” *Swofford*, 2013 WL 3333063, at \*7 n.3 (emphasis added). As in *Swofford*, the ALJ was entitled to and did rely on the VE’s expertise.

In addition to relying on her own experience and expertise, (Tr. 60) (“And [your testimony] was based on your experience and research you’ve done? A. Yes.”), it also appears that the VE relied on labor market surveys. *Cf. Buckner-Larkin*, 450 F. App’x at 628 (“The vocational expert noted that although the DOT does not discuss a sit-stand option, his determination was based on his own labor market surveys, experience, and research.”) The VE explained that available labor market surveys indicated, for example, that

1 there were "approximately 700 sedentary [electronic worker] jobs in  
2 the [regional] labor market [and] 49,000 nationally." (Tr. 59.)  
3 The ALJ then inquired as to whether the sedentary electronic worker  
4 jobs would allow for a sit/ stand option. The VE acknowledged that  
5 these positions "w[ould] allow for a sit/stand option." (Tr. 59.)

6 As to the first argument, it is evident that the VE was not  
7 merely identifying "lights jobs" in response to a hypothetical  
8 concerning sedentary restrictions. The VE acknowledged that the  
9 DOT described the cashier II position (e.g., booth cashier and  
10 ticket seller) as light; however, she went on to state that "there  
11 [we]re subcategories" that qualified as sedentary work with an at-  
12 will sit/stand option. (Tr. 58-59.) The same can be said about  
13 the VE's testimony regarding electronic workers: "The DOT also  
14 describes this as light, unskilled work, SVP 2. However, available  
15 labor market research indicates there are approximately 700  
16 sedentary jobs in the labor market or 49,000 nationally." (Tr.  
17 59.)

18 The ALJ unequivocally stated that both of these sedentary  
19 positions (i.e., the subcategories of cashier II and electronic  
20 worker) would "allow for a sit/stand option and [qualified as]  
21 simple, repetitive work." (Tr. 59.) When the ALJ asked the VE  
22 whether her testimony was consistent with the DOT, she provided the  
23 following response: "Yes. . . . Expect as I otherwise mentioned."  
24 (Tr. 60.)

25 In *Distasio v. Shalala*, 47 F.3d 348 (9th Cir. 1995), the Ninth  
26 Circuit stated: "We are aware that the [DOT] classifies work as  
27 either 'light' or 'sedentary,' as between the two categories, and  
28 does not refine the categories further. But vocational experts can

1 testify whether particular applicants for disability benefits would  
 2 be able to perform subcategories of jobs within the DOT." *Id.* at  
 3 350. That is precisely what the VE did here. There was no  
 4 unexplained divergence from the DOT, as Rowland posits.

5 In summary, the Court concludes that the ALJ's findings were  
 6 supported by substantial evidence and were free of legal error.  
 7 Even assuming for the sake of argument that the ALJ had erred, the  
 8 Court would nevertheless conclude that any error was harmless  
 9 because "no reasonable ALJ . . . could have reached a different  
 10 disability determination." *Stout v. Comm'r Soc. Sec. Admin.*, 454  
 11 F.3d 1050, 1056 (9th Cir. 2006).

## 12 VI. CONCLUSION

13 For the reasons stated, the Commissioner's decision should be  
 14 AFFIRMED.

## 15 VII. SCHEDULING ORDER

16 The Findings and Recommendation will be referred to a district  
 17 judge. Objections, if any, are due **September 23, 2013**. If no  
 18 objections are filed, then the Findings and Recommendation will go  
 19 under advisement on that date. If objections are filed, then a  
 20 response is due **October 10, 2013**. When the response is due or  
 21 filed, whichever date is earlier, the Findings and Recommendation  
 22 will go under advisement.

23 Dated this 3rd day of September, 2013.

24 /s/ Dennis J. Hubel

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DENNIS J. HUBEL

26 United States Magistrate Judge